

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

# JEROME TURNER

## Claimant

VS.

**LATOUR MANAGEMENT, INC.**

Respondent

AND

# HIGHLANDS INSURANCE GROUP

Insurance Carrier

Docket No. 251,061

## ORDER

Claimant appealed the February 14, 2000 preliminary hearing Order entered by Administrative Law Judge Jon L. Frobish.

## ISSUES

Claimant alleges that he injured his back while working for the respondent on or about December 9, 1999 and each day worked after that date. Judge Frobish found that claimant failed to prove (1) that he sustained an accidental injury that arose out of and in the course of employment and (2) that he provided respondent with notice of the alleged accidental injury.

Claimant contends Judge Frobish erred and requested this review. Claimant did not file a letter or a brief for the Appeals Board to consider and, therefore, the Board unfortunately is without benefit of his argument.

The only issues before the Board on this appeal are:

1. Did claimant injure his back while working for the respondent on or about December 9, 1999?
2. If so, did claimant provide respondent with timely notice of the accident or injury?

FINDINGS OF FACT

After reviewing the record compiled to date, the Appeals Board finds:

1. Claimant began working for the respondent as a dishwasher and banquet setup person in late November 1999.
2. Claimant alleges that he injured his back on or about December 9, 1999, while helping his supervisor empty trash cans into a trash bin. Claimant testified that he told his supervisor about hurting his back at that time. Claimant also testified that his back worsened until he eventually sought medical treatment at an emergency room on December 21, 1999.
3. The emergency room records from December 21, 1999, contain a history that claimant began experiencing back and left ankle pain two days before the emergency room visit while lifting trash. The emergency room records contain a second history that claimant thought he injured his back at work four days before the emergency room visit while lifting a trash can.
4. The outcome of this claim relies upon claimant's credibility. Tiffany Smith, the supervisor who was helping claimant empty trash at the time of the alleged accident, testified that claimant did mention hurting his back but he was laughing and made the statement in a joking manner. Ms. Smith, who no longer works for the respondent, testified:<sup>1</sup>

Q. (Judge Frobish) When he started laughing, did you say anything to him? Like, are you kidding, did you hurt your back or anything?

A. (Ms. Smith) I kind of looked at him and he continued to laugh. And I said, I think I said, well, are you okay? And he just kind of laughed and said yeah. Because, I mean, I was lifting it with him and the fact is that I am not very strong so, I mean --

Additionally, Anita Pranter, who is employed by respondent, testified that claimant telephoned on about December 16, 1999, and advised that he could not work because he was required to enter a halfway house. During that conversation, claimant did not mention that he had a back injury. The first that Ms. Pranter knew that claimant was alleging a work-related injury was when he called towards the end of December 1999 or the first part of January 2000.

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<sup>1</sup> Continuation of Preliminary Hearing, February 14, 2000; pp. 9 and 10.

5. Judge Frobish observed claimant, Ms. Pranter, and Ms. Smith testify. After considering all of the evidence, including the various medical records, the Judge found claimant's testimony was not persuasive. In this instance, the Appeals Board gives some deference to the Judge's impression of claimant's credibility and affirms the finding that claimant failed to prove that he injured his back at work and failed to provide timely notice of the injury to respondent.

#### **CONCLUSIONS OF LAW**

1. The preliminary hearing Order should be affirmed.
2. The Workers Compensation Act places the burden of proof on injured workers to establish their right to compensation.<sup>2</sup> And that burden is to persuade the trier of facts by a preponderance of the credible evidence that their position on an issue is more probably true than not when considering the whole record.<sup>3</sup>
3. The Workers Compensation Act requires a worker to provide the employer timely notice of a work-related accident or injury. The Act reads:

Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.<sup>4</sup>

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<sup>2</sup> K.S.A. 1999 Supp. 44-501(a).

<sup>3</sup> K.S.A. 1999 Supp. 44-508(g).

<sup>4</sup> K.S.A. 44-520.

Claimant does not argue that he had just cause that excused the failure to notify the respondent of the back injury within the first 10 days of the alleged incident.

4. Claimant failed to prove that he injured his back while working for the respondent. And claimant has failed to prove that he provided the respondent with timely notice of the alleged accidental injury. Therefore, the request for benefits should be denied.

5. As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing of the claim.<sup>5</sup>

**WHEREFORE**, the Appeals Board affirms the February 14, 2000 preliminary hearing Order entered by Judge Jon L. Frobish.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of March 2000.

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BOARD MEMBER

c: Joseph Seiwert, Wichita, KS  
James A. Cline, Wichita, KS  
Jon L. Frobish, Administrative Law Judge  
Philip S. Harness, Director

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<sup>5</sup> K.S.A. 1999 Supp. 44-534a(a)(2).